IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO. 432 OF 2006

IN

NOTICE OF MOTION NO.4901 OF 2005

IN

L.C.SUIT NO. 5570 OF 2005

M/s. Joy Auto Works & Ors. ... Appellants
(Orig. Plaintiffs)

Versus

Sumer Builders Pvt.Ltd. & Anr. ... Respondents
(Orig. Defendants)

Mr. Kishore Jain & Mr.Niranjan i/b. M/s. Niranjan & Co.,Advocates for the appellants.

Mr. N.N.Walawalkar, Senior Counsel, for Mrs. Geeta Joglekar, Advocate for respondent No.2.

Mr. P.K.Dhakephalkar, Senior Counsel, i/b. M/s. Yasmin Bhansali & Co. for respondent No.1.

CORAM: J.H.BHATIA,J.

DATE: 12th December,2007.

P.C.

1. Being not satisfied with the order passed by the trial Court in Notice of Motion No. 4901 of 2005, the original plaintiffs have preferred the present Appeal.

2. To state in brief, the case of the plaintiffs is that Original Plot No.227 belonged to one Khatau Bhanji, who had leased out 1305 sq. yards land out of the said property to appellant No.1 for a period of three years commencing from 15th October, 2005 with an option to renew for further period of 2 years. Award was passed under the MRTP Act and Final Plot No.879 was allotted to Jetha Bhanji in lieu of the original plot No.227 admeasuring 3640 sq. yards. Plaintiff No.2 purchased the plot No.878 under two registered sale deeds dated 16.8.1988 and 13.12.2005 from the owner of the said plot, viz. Mr. Javle. The Plot No.878 is adjoining the plot No.879. Plaintiff No.1 is in occupation of 1305 sq. yards land out of final plot No.879, which is now the property of defendant No.1. The suit for ejectment filed by the Administrator of the property had abated on 19.9.1977 and thereafter nobody has claimed rent of the land from plaintiff No.1 and as such since 1977, he is in undisurbed, continuous and open

possession of the said land and has become owner by adverse possession. According to the plaintiffs, plaintiff No.1 had always used two accesses to the said piece of land since 1977 from public road. Those passages or accesses are marked access No.1 and access No.2 in the sketch by the plaintiffs. According to the plaintiffs, there is no other access to their land from public road. It is the contention of the plaintiff No.2 that there is no other way or access to her plot No.878. Therefore, they are entitled to make use of the disputed passages being access Nos. 1 and 2 shown in the sketch.

3. With these pleadings, the plaintiffs filed suit for perpetual injunction and by the Notice of Motion, the plaintiffs sought injunction restraining defendant No.1 from obstructing or interfering with the use, occupation and possession of the plaintiffs over the final plot No.878 admeasuring 1000 sq. yards and final plot No.879 to the extent of 1305 sq. yards together with structures thereon along with two access upto public road. They further sought injunction restraining defendant no.1 from putting or constructing or placing any gates upon the said property. They also sought temporary injunction pending the hearing and final disposal of the suit restraining defendant No.2 - Municipal Corporation from approving any plans for construction of compound wall or gates on the plot

bearing Final Plot No.879, which may obstruct the free and full use of two accesses to road by the plaintiffs.

4. Ad-interim injunction as against defendant No.1 was granted by the learned trial Court on 23.12.2005 with notice to the defendants. The defendants contested the claim of the plaintiffs. According to defendant No.1, he has become owner of the final plot No.879 admeasuring 3043.50 sq. mttrs. under a deed of conveyance dated 20.12.2004 executed by one Lalji Thakkar, the sole administrator of the owner of the property. It is contended that originally, the City Survey No.1218 with original plot No.227 was admeasuring 4874.95 sq. yards. In the town Planning Scheme (TPS IV) for the Mahim Division, the said original plot No.227 was given final plot No.879, but its area was reduced to 3043.50 sq. mtrs. which the defendant no.1 had purchased. The remaining area of the original plot No.227 was merged in the final plot No.878 which the plaintiff No.2 claims to have purchased from Mr. Javle. As per the Town Planning Scheme IV, abutting the final plot No.878, there is a 40 feet wide D.P. Road. Plaintiff No.1 had his structures on the land which he claims to have taken on lease. Out of that land, 1000 sq. yards is now part of the final plot no.878 belonging to plaintiff No.2. Only a small portion of that structure is on the final plot No.879. It is

denied that plaintiff has become owner of that portion by adverse possession. As the property of the plaintiffs is abutting the 40’ wide D.P.road provided in the TPS IV, they have the right of passage only by that road. They have never enjoyed any right of access through the property of defendant no.1. They have not established any easementary right of necessity and, therefore, they are not entitled to get any injunction. Defendant No.2 also contested the application.

5. After hearing the parties on Notice of Motion, the learned Trial Court rejected the claim of plaintiffs about two accesses, being Access No.1 and Access No.2. However, the trial Court allowed the plaintiffs to use access No.2 to approach that plot from public road but not for vehicles.

6. The learned trial Court, came to the conclusion that as per the admissions of plaintiff No.1 in the previous suits filed by him, 1000 sq. yards land, out of the land which he had taken on lease in 1962, is now part of the final plot No.878 which is purchased by plaintiff No.2. It is material to note that even though plaintiff No.1 - M/s. Joy Auto Works was earlier a partnership firm, now it is Proprietorship concern of Mulji Umershi Shah. The said Mulji Shah is the husband of plaintiff No.2 and, therefore, plaintiff Nos. 1 and

2 may be referred as husband and wife wherever it is necessary. The learned trial Court also came to the conclusion that as per TPS IV, the Municipal Corporation was to provide 40’ wide D.P. Road abutting plot No.878. Mr. Javle had by Writ Petition No.1667 of 1984 sought direction to the Municipal corporation i.e. defendant No.2 to remove hutments and to construct proposed 40’ wide D.P. road abutting the final plot No.878. That Writ Petition came to be withdrawn on 7.8.1984 in view of the statement made by the Municipal Corporation that notice under Sections 89 and 90 of the MRTP Act would be issued and demolition of the encroachments would be carried out as per law. Accordingly, on 8.8.1984, the B.M.C. had issued notice. Incidentally, one Arun Sales who was a licensee of plaintiff No.1, had filed L.C. Suit No.5822 of 1984 against the Municipal Corporation challenging the notice. It had also taken out Notice of Motion No.4620 of 1984 restraining the Municipal Corporation from acting upon that notice till disposal of the suit. The plaintiffs admit that the said Notice of Motion was dismissed. That suit also came to be disposed of in view of some settlement of plaintiffs with Javle family, who were parties to that suit and as a result of that settlement, the final plot no.878 came to be purchased by plaintiff No.2 from the Javle family. It indicates that when the Municipal Corporation issued notice for demolition and removal of encroachments for

the purpose of construction of D.P. Road, plaintiff No.1 and his licensee Arun Sales Pvt.Ltd. challenged the notices and thus created obstacles in the removal of encroachments.

7. It is an admitted fact that inspite of having made a statement before the Court way back on 7.8.1984, defendant no.2 - the Municipal Corporation did not take any effective steps besides issuing the notices for removal of encroachments and for construction of the road as per the D.P.Plan. Admittedly, certain encroachments and huts are still in existence on that proposed D.P. Road. That shows the lack of intention, desire, determination and utter failure on the part of the authorities of the Bombay Municipal Corporation to act as per law and to remove the unauthorised occupants and encroachers from the public property. As that statement was made before the Court in Writ Petition filed by Javle, the predecessor of plaintiff No.2 and as the Municipal Corporation has utterly failed to comply with that statement, possibly, plaintiff No.2 could move this High Court for contempt of Court against the Municipal Corporation and those authorities. I hasten to add that I do not intend to express any opinion on such action because it is not known what defence the Municipal Corporation may have. However, it is also worth noting that during the hearing of this Appeal, the

learned Senior Counsel for the Municipal Corporation was asked to make a statement as to within how much time the Municipal Corporation intends to take necessary action for removal of the encroachments and to make the D.P. Road available, but the learned Senior Counsel, after taking instructions, told the court that the Municipal Corporation is not in a position to make any such statement about the period within which the encroachments can be removed and the D.P.Road can be made available. This indicates total lack of desire on the part of the Municipal authorities to remove the unlawful encroachments on the public property and the public roads, which encourages the unscrupulous elements in society to take illegal possession of the public property in the city creating number of problems for the law-abiding citizens.

8. According to the plaintiffs, original plot No.227 is given the final plot No.879 and the area is 3640 sq. yards. According to the plaintiffs, this includes 1305 sq. yards land which was taken by plaintiff No.1 on lease in 1962 and fo which he claims to have become owner by adverse possession since 1977 onwards. It is their contention that original plot No.231 was given final plot No.878 and that plot has been purchased by plaintiff No.2. It is contended that for the use of the land taken on lease, plaintiff No.1

had access from two sides through the plot no.227 and those two access are shown as access No.1 and access No.2 in the sketch. After making an amendment in the plaint, it was pointed out that some part of the passage shown as access No.2, beginning from K.S.Bhole Road (Old Prabhadevi Road) runs through the final plot No.880 and then it takes a turn through plot No.879 and that passage goes upto the plot No.878. As far as access No.1 is concerned, it is shown to be 8’.6" wide road and it runs through the middle of final plot No.879 and cuts that plot into two almost equal pieces. According to the plaintiffs, plaintiff No.1 had taken the land on lease for Auto Workshop and the land could be used only if there were access to the said land through plot No.227 (final plot No.879) and, therefore, they have got easement of necessity through that plot. This contention of the plaintiff is denied by defendant No.1 on the basis of admissions of plaintiff No.1 himself in the earlier suits filed by him. The learned trial Court has dealt with the pleadings of the plaintiff No.1 in his earlier two suits in paras 18, 19 and 20 of the impugned order. If the admissions of plaintiff No.1 in Suit no.6544 of 12975 and Suit No.7540 of 1977 are read together, there remains no doubt that during the year 1975-1977, when he filed those two suits, his plea was that he had taken a piece of land i.e. 1305 sq. yards from the original plot No.227 under a registered lease

deed dated 20.10.1962. In the year 1971, Keshav Vinayak Javale, who was defendant No.4 in Suit No.6544 of 1975, had represented to the plaintiff that he had become owner of that part of the land under the Town Planning Scheme. The said Keshav Javale settled the matter with plaintiff No.1 and a writing was executed thereby Keshav Javale admitted tenancy right of plaintiff No.1 on that piece of the property. In para 10 of the plaint in Suit No.7540 of 1977, plaintiff No.1 had admitted that as per the Town Planning Scheme No.IV sanctioned with effect from 15.8.1963, all the rights of the lessors and lessees in the original plots were transferred to their corresponding final plots irrespective of change in areas. Keshav Javale became landlord of plaintiff No.1 as that piece of land was merged in plot No.878 and this is how that final plot No.878 admeasuring 1000 sq. yards was purchased by plaintiff No.2 from the Javale family. These admissions of plaintiff No.1 in the earlier two suits provide corroboration to the contention of defendant No.1 in the present suit that the land which was in possession of plaintiff No.1 under the lease agreement is now the final plot No.878. It appears that there is a small structure on the plot No.879 also and there is a dispute as to whether plaintiff is not entitled to that portion of the area or not. I would not like to express any opinion about that dispute. Taking into consideration the pleadings of the

parties and the record, it becomes clear that the original plot No.227 was admeasuring 4874.95 sq.. yards. It was divided into two final plots, being final plot No.879 admeassuring 3043.50 sq. mtrs. and the remaining part appears to have been merged in final plot No.878 which is now the property of plaintiff No.2 about which there is no dispute. Plaintiff No.1 has a small structure on final plot No.879 and that portion is also abutting the final plot No.878 belonging to plaintiff No.1. There is no material on record to show that the plaintiffs had ever used any right of access through the final plot No.879 belonging to defendant No.1. When the plaintiff No.2 purchased final plot no.878 under TPS IV, it was clearly understood that for the said plot, she would have a right of passage through the proposed 40' wide D.P. Road provided under the Scheme. In view of this, plaintiff No.2 could claim right only against the Municipal Corporation through such road. Plaintiff No.1 is the husband of plaintiff No.2 and his disputed structure on final plot No.879 is abutting the final plot No.878 and, therefore, he could also claim conveniently the right of passage from that D.P. Road. Only because the Bombay Municipal Corporation failed in discharging its duties and providing a road and passage to the people, the plaintiffs could not claim such a right through the property of others and thus creat obstructions in the user of their property. It is also

material to note that Suit No.6544 of 1975 was filed by plaintiff No.1 against the Planning Authorities through the Municipal Corporation and Javale family challenging the Town Planning Scheme IV. That suit and the Notice of Motion were dismissed. Suit no.7540 of 1977 was also filed by plaintiff No.1 challenging the said Town Planning Scheme and for declaration that notice issued in that respect was bad in law. His Notice of Motion as well as the Appeal were dismissed. This shows that initially, plaintiff No.1 tried to create obstructions in the Town Planning Scheme and later on his licensee - Arun Sales Pvt.Ltd. also filed Suit no.672 of 1984 against the Municipal Corporation restraining it from demolishing the structures. His Notice of Motion and the suit were also dismissed. Having failed in creating obstructions in the Town Planning Scheme, because at that time plaintiff No.1 had no legal right on that property, he settled the matter with the Javale family and plaintiff No.2 purchased final plot No.878 which was carved out in that Scheme out of the original plot No.227 as per the pleadings of plaintiff No.1 himself in the earlier suits.

9. In the facts and circumstances noted above, I find that, prima facie, the plaintiffs have no legal right of access through the final plot No.879 belonging to defendant No.1. The learned trial Court in para 34

of the impugned order observed as follows :-

> "34. As such the plaintiffs have failed to make out a prima facie case. I am aware that inconvenience will be caused to the plaintiffs, if the ad-interim reliefs are refused. However, the same has been invited by them. I am, therefore, of the view that limited relief which can be granted to the plaintiffs is to direct the defendant No.2 to allow the plaintiffs to have access to the plot in their possession through F.P.No.878 purchased by the deft. No.1. But this will not work as a right for motorable access. Ld. Advocate Mr. Malgaonkar in fact had made this concession even at the initial stage of the motion. ..."

With these observations, the learned trial Court granted limited relief to the plaintiffs for passage through access No.1 as per the sketch while making it clear that the plaintiffs will not have motorable access as prayed and they will also have no access through access No.2 as shown in the sketch. As the trial Court used this discretion in granting limited relief to the plaintiffs inspite of coming to the conclusion that the plaintiffs have no prima facie case and in view of the fact that the said order has not been challenged by defendant

No.1, I see no justification or ground to interfere with that order. Anyway, there is no substance in the present Appeal preferred by the original plaintiffs.

10. In the result, the Appeal stands dismissed.

11. At this stage, the learned Counsel for the appellants-plaitiffs makes a request that the status quo as of today, which has been so far maintained as per the order of this Court dated 1st August, 2006, may be continued for further period of 8 weeks. The request is objected to by learned Counsel for the respondents. However, in the interest of justice, the interim arrangement as per the order dated 1.8.2006 shall continue for further period of six weeks.

(J.H.BHATIA,J.)